

August 22, 2003

Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: “Report and Order of the FCC, Adopted June 26, 2003 in the Matter of the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991”

Dear Sir or Madam:

The National Restaurant Association, on behalf of itself and its members (hereafter collectively “NRA”), respectively submits these comments to the FCC’s Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) published in the Federal Register on July 25, 2003. NRA urges the FCC to reinstate both the existing business relationship exception to its rules, and also the *prior* definition of existing business relationship. NRA further requests that FCC clarifies the final rules and state that unsolicited facsimile communications are neither prohibited nor included within the meaning of the statutory term “unsolicited advertisement” when issued by tax exempt, not-for-profit, organizations such as NRA when contacting persons or organizations in furtherance of their tax-exempt purposes.

#### Background

The National Restaurant Association is a not-for-profit trade association incorporated under the Illinois General Not-For-Profit Corporation Law, and exempt from federal taxation under section 501(c)(6) of the Internal Revenue Code (IRC). NRA is a membership organization, consisting of some 300,000 member outlets. Its corporate purposes are to represent, promote and educate the restaurant industry. Its exempt services for the membership and the industry include, among other things:

- (a) influencing government actions which will allow the industry to serve society’s needs effectively, efficiently, safely and profitably;
- (b) providing leadership for the industry by developing and articulating responsible positions on public policy and industry-related issues;

- (c) increasing Association membership and membership participation and representation;
- (d) serving as central information and research resource on all aspects of the foodservice business;
- (e) informing and educating industry personnel on operating principles and techniques that will enhance their ability to serve the public; and
- (f) serving as the primary, central source of educational products and services and creating high national standards of professionalism.

### TCPA

The Telephone Consumer Protection Act (TCPA) prohibits the use of telephone facsimile machines, computers or other devices to send an unsolicited advertisement. 47 USC 227 (b)(1)(c). An “unsolicited advertisement” is defined in the statute, 47 USC 227(a)(4), as:

any material advertising the  
commercial availability or quality  
of any property, goods or services ...  
transmitted to any person without  
that person’s prior express invitation or  
permission. (Emphasis added)

The FCC released a Memorandum Opinion and Order in 1995 stating that communications made by tax exempt nonprofit organizations were exempt from these TCPA rules. Also, in a 1992 interpretation of the TCPA and its own regulations, the FCC stated that persons or entities that have an established business relationship with the recipient of the fax are considered to be invited or permitted by the recipient to send faxes. Report and Order, 7 FCC Rcd 8752, 8779 (1992).

Under the new rules proposed July 25, 2003, however, the FCC: (1) reversed itself on the “established business relationship” exception, stating that this exception will no longer be recognized, thus requiring a person’s prior written permission, 68 Federal Register 4580, and (2) made no mention whether the exemption for not-for-profit organizations such as NRA continued or was repealed.

### NRA Comments

The NRA submits three basic comments for consideration. First, the FCC's proposal to change its long-standing approach that an "established business relationship" no longer suffices to show "express invitation or permission" within the meaning of 47 USC 227 (a)(4), will place a substantial administrative burden on our member businesses by requiring them to obtain the signed written consent of each fax recipient before any commercial fax may be sent. This would severely impede their ability to communicate with their customers or make them aware of events and products that would be of interest to them. It will also be very difficult for small businesses to determine when written permission agreements expire. The administrative task of tracking every customer phone call, e-mail, fax, etc. in order to determine if required transactions/inquiries meet the required 18-month/3-month time periods could be overwhelming for smaller employers.

Second, the new FCC rules are unclear whether they apply to not-for-profit organizations. The statute essentially prohibits using a "telephone" facsimile machine to send "unsolicited" advertisements. 47 USC 227 (b)(1)(C). Congress, however, specifically exempted from "telephone solicitations" all tax exempt nonprofit organizations. 47 USC 227 (a)(3).

NRA urges the FCC to continue to recognize this congressionally mandated intent not to include tax exempt nonprofit organizations from the type of solicitations restricted under 47 USC 227 (b)(1)(C). It respectfully asks that the Commission further define the new regulations to clarify that they do not apply to such communications. To construe the statute otherwise would appear to conflict with congressional intent manifested in subpart 227(a)(3) of the statute and infringe on tax exempt groups' ability to communicate with their members, the industry or the public they serve.<sup>1</sup>

Third, it is also unclear to what extent the change to the "established business relationship" definition applies to tax exempt organizations' activities that effectuate their tax exempt purposes. For example, trade associations generally, and NRA specifically, carry on a number of exempt activities for their members and the industry, e.g., by sending facsimile updates of legislative activity, newsletters of industry developments; notices of meetings; surveys; Political Action Committee (PAC) solicitations; etc. No direct charge is made for such services. Trade associations, such as NRA, also send facsimile transmissions concerning other exempt activities for which charges are made, e.g., notices about trade association membership applications and renewals for which

---

<sup>1</sup> Should the FCC decline to continue to recognize this exemption, a question would also exist whether the FCC rules are unconstitutional as applied to tax exempt nonprofit groups under the 1<sup>st</sup> Amendment as a prohibited regulation of free speech. Compare, e.g., Missouri Exrel Nixon v. Am. Blastfax, Inc., 323 F3d649 (8<sup>th</sup> Cir. 2003). However, since administrative agencies normally do not address issues about the constitutionality of the statute or regulations they enforce, NRA will not discuss the constitutional question in this submittal to the FCC.

dues are charged, conferences and publications on industry matters for which charges are assessed, trade association solicitations for companies to sponsor association events or activities, etc. The question is that to the extent tax exempt, not-for-profit, groups such as NRA are covered by the new rules, to what extent the new rules restrict facsimile notices of such activities without prior permission?

### Conclusion

NRA respectfully urges the FCC to issue clarification on issues raised in this comment letter. We urge the FCC to reinstate both the existing business relationship exception, and the *prior* definition of existing business relationship. And we also urge the FCC to state that facsimile communications sent by tax-exempt organizations such as NRA that are consistent with the organizations tax-exempt, not-for-profit purposes are excluded from the statutory term "unsolicited advertisement."

Respectfully submitted,

Nationa

By: \_\_\_\_\_

Stev

Pres

cer

\_\_\_\_\_  
L. Culpepper

Government Affairs and Public Policy

\_\_\_\_\_  
Peter Kilgore

Senior Vice President & General Counsel